Supreme Court, U.S.
FILED
FEB 19 2002
OFFICE OF THE CLERK

No. 01–419

IN THE
Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,
Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF PETITIONERS

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed After Conclusion]

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QUESTION PRESENTED

Does 49 U.S.C. § 14501(c)(2) of the Interstate Commerce Act preclude the sovereign states from delegating their authority to enact safety regulations regarding local tow-truck operations to political subdivisions such as cities and counties?

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INTERESTS OF THE *AMICI*

The States have a substantial interest in the question presented in this case. The Sixth Circuit's decision precludes the States from delegating their general police power authority over public safety on local streets and roads to units of local government which are, by definition, subdivisions of the State.

In practice, all States delegate considerable police power authority to cities, counties, and municipal associations, including responsibility over public safety issues on local streets and roads. All States have constitutional or statutory provisions addressing and providing for such delegations of the States' police power authority. Nothing in the Constitution dictates how the States exercise their reserved police powers, for good reason. Nor should this Court permit federal statutes to dictate such matters to the States.

The States respectfully request that this Court reverse the Sixth Circuit.

STATEMENT OF THE CASE

The *amici* States adopt by reference the petitioners' statement of the case.

SUMMARY OF ARGUMENT

The Sixth Circuit's reading of the statutory phrase "safety regulatory authority of a State" as precluding the States from determining, in their discretion, whether and how to exercise that authority—including the option of delegating to local government units—runs directly contrary to the longstanding assumption that the Constitution reserves to the States precisely such discretion.

In stark contrast to the Sixth Circuit's decision in this case, the Court long has recognized the general rule that a reservation of regulatory authority to the States in a federal statute that might otherwise preempt state regulation "leaves the allocation of regulatory authority to the 'absolute discretion' of States themselves, including the option of

leaving local regulation . . . in the hands of local authorities." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 608 (1991).

A contrary interpretation of section 14501(c)(2)(A) raises "serious constitutional doubts," given that the Court has always interpreted the Constitution as generally precluding the federal government or federal law from dictating the form of and allocation of power within, State governments. *See, e.g., Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Mayor v. Educ. Equal. League,* 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental power"); *see also Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Eliminating the States' discretion to determine whether and how to delegate police power authority to units of local government flies in the face of longstanding tradition and precedent, not to mention state constitutional and statutory provisions in all fifty states, as cited and discussed below.

That result is completely unnecessary and easily avoidable. For over 130 years, the Court has repeatedly invoked the proposition that "when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution." *Miller v. United States*, 78 U.S. 268, 309 (1870).

As it has done in recent cases implicating important state sovereignty concerns, *e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Jones v. United States*, 529 U.S. 848 (2000), the Court should invoke that principle in this case and reverse the Sixth Circuit on purely statutory grounds.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 14501(c)(2)(A) PERMITS THE STATES TO DELEGATE THEIR "SAFETY REGULATORY AUTHORITY . . . WITH RESPECT TO MOTOR VEHICLES" TO POLITICAL SUBDIVISIONS.

As amply demonstrated in petitioners' opening brief, the statutory language at issue here--reserving from preemption "the safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(c)(2)(A)--does not leave the Court with no conclusion other than the one the Sixth Circuit reached here. Indeed, two lower courts have reached a different (and in our view the correct) conclusion. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999); *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *review denied* (May 16, 2001).

It is true that political subdivisions are specifically mentioned in the general preemption provision of the statute, and not in the safety regulatory authority exemption that follows it. And it is further true that there is a canon of construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

But canons of construction are precisely that: "canons," and not absolute rules that override constitutional limitations or other substantial considerations. Indeed, as this Court is well aware, canons of construction can sometimes be in conflict with each other. Mindless adherence to any particular canon may, in a particular case, lead to an unreasonable and unnecessary reading of a statute.

Indeed, if the extremely plain language of § 14501(c)(2)(A) was the only issue here, we probably would not be before the Court in this case. The plain language of that section alone permits only one conclusion here: that the States retain their general police power regulatory authority over motor vehicles and may delegate that authority (or not) as they so choose.

Stripped to its essence, Respondents and the Sixth Circuit ultimately rely *solely* on the *Russello* canon of construction, and nothing more. They simply have no other argument on this point.

In blind reliance on that canon of construction, they would have this Court ignore its own clear decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991), which addressed a similar issue in the context of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). FIFRA expressly permits only "States" to regulate pesticides, but the Court nonetheless held that the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.*

The Court explained in *Mortier*:

> The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" . . . in [its] absolute discretion.'" The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" *because political subdivisions are components of the very entity the statute empowers*.

501 U.S. at 607-08 (emphasis added) (internal citations omitted).

Because *Mortier* concluded that FIFRA permits the States to delegate authority to political subdivisions even though the

federal statute does not expressly mention such local government entities, the Court should reach the same conclusion here (and avoid substantial constitutional questions by so doing). *Cf. People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001) ("Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress."); *Mich. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998) (state can choose to delegate its regulatory authority to a state agency, the Michigan Public Service Commission, rather than having the state legislature enact a statute)

Moreover, interpreting federal statutory references to the "State" to include state agencies and political subdivisions makes sense from a preemption perspective. The United States Code is replete with provisions that purport to preempt "State"—but not "local"—laws. And Congress often does not define the word "State" in such provisions.

Lower courts generally have concluded that such preemption provisions do not preserve local authority, even though the laws refer only to "State" regulation. *See, e.g., Southeastern Oakland City Res. Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 169 (6th Cir. 1993) (rejecting city's argument that the Clean Air Act reserves power to local governments independent of state control); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1064-65 (9th Cir. 1987) (rejecting city's argument that, by naming "State[s]" but not "municipalit[ies]" in the Hazardous Liquid Pipeline Safety Act's preemption provision, Congress intended to preempt State but not municipal regulation).

The Sixth Circuit's approach in this case would suggest just the opposite result, *i.e.*, when Congress uses the word "State" in a preemption provision but fails to include "political subdivisions" or explicitly define "State" to include them, a federal law preempts only the state legislatures (and maybe state agencies) from acting, and not local governments. That result—which it is unnecessary to reach in this case—defies both common sense and the traditional preemption practices of Congress.

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE STATUTE RAISES SERIOUS CONSTITUTIONAL DOUBTS.

A. THE COURTS GENERALLY INTERPRET FEDERAL STATUTES TO AVOID SERIOUS CONSTITUTIONAL DOUBTS.

For at least 130 years, the Court has made clear that "when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution." *Miller v. United States*, 78 U.S. 268, 309 (1870).

In recent years, the Court has recognized that this fundamental principle has particular force with respect to federal statutes that might be interpreted to infringe on state sovereignty interests that the Constitution protects. *E.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (declining to interpret the word "person" in a federal *qui tam* statute to include the States in order to avoid serious Eleventh Amendment questions); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (declining to read the Clean Water Act to authorize a federal agency to assert regulatory jurisdiction over ponds and mudflats because to do so "would result in a significant impingement of the States' traditional and primary power over land and water use"); *Jones v. United States*, 529 U.S. 848, 857 (2000) (declining to interpret the federal arson statute to reach arson that has no significant connection to or impact on interstate commerce and thus involves only "traditionally local criminal conduct").

This fundamental principle serves important constitutional interests by avoiding the unnecessary resolution by the Court of difficult constitutional questions, as well as minimizing interbranch and federal-state conflicts. Indeed, the Court has made clear that the "constitutional doubt" "'canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)).

Similarly, the Court has repeatedly emphasized that this principle complements another fundamental interpretive rule: "that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" *Stevens*, 529 U.S. at 787 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989), and citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *United States v. Bass*, 404 U.S. 336 (1971)).

B. THE CONSTITUTION RESERVES TO THE STATES THE DISCRETION TO DELEGATE THEIR GENERAL POLICE POWER AUTHORITY TO POLITICAL SUBDIVISIONS.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Court has recognized that this Amendment represents a fundamental proposition of our Constitution, and that the federal government does not have unlimited or general police power authority. The federal government has no constitutional

authority to direct the States to act in a governmental capacity—such as by requiring the states to pass legislation. *New York v. United States*, 505 U.S. 144 (1992). Nor can the federal government conscript state officials to implement and enforce federal law, *Printz v. United States*, 521 U.S. 898 (1997), or determine by federal law the necessary qualifications of state government officials. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

The intrusion on state sovereignty and prerogatives in this case is no less threatening to the operation of state government than the federal actions the Court has invalidated in the cases cited above. Indeed, the Sixth Circuit's interpretation of section 14501(c)(2)(A) may have an even greater detrimental effect on state government than the federal requirements the Court struck down in *Ashcroft, New York* and *Printz*.

As a practical matter, state government could hardly function without the ability to engage in significant delegation of state police power authority to units of local government and state agencies. A rule that would require the state legislature to be the *sole* implementer of all laws and policies within a state would be a dramatic and unwarranted change in American democracy.

It is indisputable that a municipal corporation is a department of the state. For that reason, the state may "fashion its basic law so as to grant home rule or self-government to its municipal corporations." *District of Columbia v. John R. Thompson Co.*, 364 U.S. 100, 108 (1953).

In doing so, the state may give to its municipalities an authority as broad as the authority the state itself possesses. *District of Columbia*, 364 U.S. at 108 ("the delegated power of municipalities is as broad as the police power of the state, except as may be restricted by terms of the grant or by the state constitution").

Even though state legislatures might in fact decide to pass and implement tow-truck regulations, the legislatures may well lack intimate knowledge of and expertise with local safety issues. The political subdivisions of the State may well be in a better position to address traffic safety and other issues that vary widely in nature and degree from city to city or county to county. Moreover, state legislatures cannot possibly respond to some situations as swiftly as local governments may. That is not to say that a State cannot or should not choose to enact traffic safety rules at the state level, only that it may have good reasons for choosing not to do so.

Thus, by necessity, and as a matter of common sense, *all* states have delegated police power authority to local governments. These delegations vary in scope and definition, but they generally permit local governments the authority to regulate a host of municipal affairs, including traffic safety issues to some extent, except where local regulations would conflict with a state's general law. *See, e.g.,* Ala. Code § 11-45-1; Alaska Const. art. X, § 11; Ariz. Const. art. XIII, § 2; Cal. Const. art XI, § 7; Colo. Const. art. XX, § 6; Conn. Gen. Stat. § 15.2-1102; Del. Code. Ann. tit. 22, § 802; Fla. Const. art. VIII, § 2; Ga. Code Ann. § 36-34-1; Haw. Const. art. VIII, § 2; Idaho Const. art. XII, § 2; 65 Ill. Comp. Stat. Ann. 5/11-1-1; Ind. Code § 36-1-3-2; Iowa Const. art. III, § 38A; Kan. Const. art. 12, § 5; Ky. Rev. Stat. Ann. § 82.082; La. Const. art. 6, § 5; Me. Const. art. VIII, Part 2, § 1; Md. Const. art. XI-E, § 3; Mass. Const. art. II, § 6; Mich. Const. art. VII, § 21; Minn. Stat. § 410.04; Miss. Code Ann. § 21-17-5; Mo. Const. art. 6, § 19; Mont. Const. art. XI, § 6; Neb. Const. art. XI, § § 2-4; Nev. Rev. Stat. Ann. § 266.010; N.H. Rev. Stat. Ann. § 31.39; N.J. Stat. Ann. § 40:69A-30; N.M. Const. art. X, § 6; N.Y. Const. art. IX, § 2; N.C. Const. art. VII, § 1; N.D. Const. art. 7, § 1; Ohio Const. art. XVIII, § 3; Okla. Const. art. XVIII, § 3A; Or. Const. art XI, § 2; Pa. Const. art. 9, § 2; R.I. Const. art. XIII, § 2; S.C. Const. art. VIII, § 17; S.D. Const. art. IX, § 2; Tenn. Const. art. XI, § 9; Tex. Const.

art. XI, § 5; Utah Const. art. XI, § 5; Vt. Stat. Ann. tit. 24, § 2291; Wash. Const. art. XI, § 11; W. Va. Const. art. VI, § 39; Wis. Const. art. XI, § 3; Wyo. Const. art. 13, § 1.

It is beyond question that the Constitution generally does not dictate the form or structure of state and local governments, nor the allocation of state power between those entities. *See, e.g., Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Mayor v. Educ. Equal. League,* 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental power"); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1101 (7th Cir. 1995) (recognizing and citing numerous cases for "the principle that the federal Constitution does not prescribe any particular separation of powers, or other internal structure, of state government").

Nor should federal statutes such as section 14501(c)(2)(A) be permitted to do so. If Congress may dictate whether a state may delegate its reserved police power authority (expressly recognized and protected by the Tenth Amendment), then could Congress tell a state how to structure its court system? Or how many legislators to have? Or what executive departments are permissible? Surely not.

In order to fully respect the States' interests, it is enough in this case for the Court simply to hold that the Sixth Circuit erroneously relied on the *Russello* canon of construction without respecting the "constitutional doubt" principle with which all canons of construction must coexist.

But the Court might also reiterate that a "clear statement" principle operates in this context. Indeed, there should be a strong presumption that any federal statutory reservation (or for that matter, preemption) of police power authority to a "State" or the "States" necessarily includes units of local government. Thus, section 14501(c)(2)(A) can and should be

read to preserve the States' discretion to choose to delegate some of the reserved authority to units of local government or state agencies. Such reservations are not simply to the "state legislatures," unless Congress expressly so declares.

"When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Thus, only a clear congressional directive should override the presumption in favor of leaving to the States the decision whether and how to delegate reserved police powers. And if and when Congress enacts such a clear directive, this Court will then have to confront serious constitutional questions, but not until then. Section 14501(c)(2)(A) is not such a directive.

The consequence of the Sixth Circuit's decision is to force the States to enact safety regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets. In fact, the Sixth Circuit's decision might even be read to preclude state legislatures from delegating to state agencies the power to develop and implement such regulations.

For the reasons discussed above, such results are unnecessary in this case and unwarranted as a matter of constitutional law. As a matter of Federal-State comity and common sense, federal courts should be reluctant to discern a congressional intent to undermine a bedrock principle of traditional State power and governmental practice.

CONCLUSION

The Sixth Circuit's erroneous decision should be reversed.

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER.
State Solicitor
(Counsel of Record)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed Below]

February, 2002

BILL LOCKYER
Attorney General
State of California

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

STEVE CARTER
Attorney General
State of Indiana

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

MIKE MCGRATH
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

ELIOT SPITZER
Attorney General
State of New York

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W. A. DREW EDMONDSON
Attorney General
State of Oklahoma

SHELDON WHITEHOUSE
Attorney General
State of Rhode Island

MARK BARNETT
Attorney General
State of South Dakota

JOHN CORNYN
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington